

## Appendix 2 - Major cases dealing with a refusal to deal

Decision / date	Finding	Circumstances that led to the finding
<p><b>08-D-08, 29 April 2008,</b> <b><i>Sale of historical site books</i></b></p>	<p><b>Absence of essential facility</b> Decision of the French Competition Council rejecting the complaint</p>	<p>This case deals with the French Center for National Monuments (CNM), in charge of promoting cultural monuments in France, which as part of his mission, acts as an editor of cultural books and also administers a network of specialised bookshops. The complainant, Editions Gisserot, an editor specialised in tourism and historical site books, was in commercial relations with the CNM following a call for tender organised in 2004 by the CNM and won by Editions Gisserot. According to the agreement entered into, CNM undertook each year during three years to purchase a minimum amount in books to Editions Gisserot, who in return granted an important rebate.</p> <p>Editions Gisserot brought a complaint to the French Competition Council when the CNM refused to purchase three of its “best sellers” (on the Mont-Saint-Michel, the city of Carcassonne and Cluny Abbey), in order to sell instead in its bookshops located in these three historical sites its own competing books.</p> <p>The French Competition Council examined whether CNM bookshops located in the Mont-Saint-Michel, Carcassonne and Cluny Abbey constituted essential facilities for purpose of selling the three books these respective historical sites.</p> <p>The French Competition Council stated the four conditions to be met under the essential facility doctrine, that is to say: (i) access to the facility is absolutely necessary, (ii) the facility cannot be reproduced under reasonable terms, (iii) access to the facility is refused or subject to unjustified restrictions, and (iv) access to the facility is possible. Then it focused on the first of these conditions: whether access to CNM bookshops located in the Mont-Saint-Michel, Carcassonne and Cluny Abbey was absolutely necessary in order to sell the three books at issue.</p> <p>With regard to the Mont-Saint-Michel, the French Competition Council noted that, while the CMN bookshop enjoyed an important position, it was not the only channel of distribution available (more than 45% of all the books on the Mont-Saint-Michel and more than 25% of the complainant’s books on the Mont-Saint-Michel were sold outside the CMN bookshop; moreover, the share of the complainant’s books sold outside of the CMN bookshop had risen by more than 40% in two years).</p> <p>With regard to Carcassonne, the French Competition Council noted that the CMN bookshop faced active competition from other bookshops (around 26,5% of the books on Carcassonne were being sold through the CMN).</p>

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		<p>With regard to Cluny Abbey, after having noted that the CNM enjoyed a 90% market share, the French Competition Council still considered that access to its bookshop was not absolutely necessary given the existence of “<i>alternative selling points, even in a small number</i>” (§ 91).</p> <p>Based on these findings, the French Competition Council concluded that none of the CNM bookshops constituted an essential facility for the purpose of selling historical site books and rejected the complaint.</p> <p>No press release available.</p>
<p><b>08-D-04, 25 February 2008,</b> <b>NMPP</b></p>	<p><b>Absence of essential facility</b></p> <p>Decision of the French Competition Council accepting the commitments presented by NMPP</p> <p>The initial finding of essential facility by the French Competition Council was overturned by the Cour de cassation and the Court of Appeal of Paris</p>	<p>The company Nouvelles Messageries de la Presse Parisienne (NMPP) was refusing access to Messageries Lyonnaises de Presse (MLP) to its software called Presse 2000, which was designed to facilitate the distribution by intermediaries of newspapers and magazines to the 32 000 selling points in France.</p> <p>In a preliminary decision<sup>1</sup>, the French Competition Council granted interim measures ordering NMPP to provide MLP with an access to its software on the ground that it could not be excluded that such software constituted an essential facility (especially considering the intermediaries’ reluctance to manage two different software at the same time). The Court of Appeal of Paris<sup>2</sup> confirmed the interim measures, stating that NMPP’ software could not be reproduced on reasonable economic terms and indeed constituted an essential facility.</p> <p>The Cour de cassation<sup>3</sup> annulled this decision, because the Court of Appeal had failed to demonstrate that the software at issue was an essential facility, in particular it had not shown the absence of alternatives available on reasonable economic terms. The case was then referred back to the Court of Appeal of Paris which ruled again on the validity of the interim measures.</p> <p>The Court of Appeal<sup>4</sup> ruled this time that NMPP’ software was not an essential facility. It noted that MLP had its own software. While this alternate solution required on the part of intermediaries to work with two</p>

<sup>1</sup> Decision n°03-MC-04, *MLP/NMPP*, see press release in English: [http://www.autoritedelaconurrence.fr/user/standard.php?id\\_rub=127&id\\_article=249](http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=127&id_article=249).

<sup>2</sup> Court of Appeal of Paris, 12 February 2004.

<sup>3</sup> Cour de cassation, 12 July 2005.

<sup>4</sup> Court of Appeal of Paris, 31 January 2006.

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		<p>software, or to capture manually the data from one software to the other (estimated at an hour of work every day), the Court found that this did not amount to economic or technical difficulties which were unreasonable. The Court added that MLP had not demonstrated that the creation of a software similar to that of NMPP could not be achieved on profitable economic terms.</p> <p>Despite the annulment of the interim measures and the absence of an essential facility, the refusal by NMPP to grant MLP direct access to its software could still lead to capturing errors and disruptions on the part of intermediaries, as well as a discriminatory management of the newspapers concerned. Therefore, NMPP committed themselves to allow the direct injection of information relative to the newspapers distributed by MLP in its own system. The French Competition Council considered that these commitments were likely to remove the competition distortion which penalized MLP and accepted the commitments.</p> <p>Press release in English:  <a href="http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=256&amp;id_article=892">http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=256&amp;id_article=892</a></p>
<p><b>07-D-43, 10 December 2007</b></p> <p><b>Energy sector</b></p>	<p><b>Margin squeeze</b></p> <p>Decision of the French Competition Council that accepted the commitments offered by the parties</p>	<p>Direct Energie, an alternative electricity supplier to small business customers, accused Electricité de France (EDF) of four types of anticompetitive conduct, which all had a direct impact on its ability to survive and prosper in the retail electricity market: (i) margin squeeze between the wholesale price charged by EDF and EDF's retail price offered to small businesses; (ii) price discrimination between Direct Energie and EDF's own internal downstream subsidiaries; (iii) refusal to contract for a period of 15 years; (iv) non-transparent and discriminatory conditions of access to nuclear capacity.</p> <p>Of these four accusations, the Conseil (the French Competition Authority or "FCA"), in its first decision granting interim measures, concurred only with the first. On the basis of detailed cost analyses provided by the complainant, the Commission de Régulation de l'Energie (CRE – French energy regulator) and the DGCCRF (the other French Competition Authority), the FCA looked at the possible existence of a margin squeeze on a number of customer sub-segments, defined according to consumption patterns and applicable tariffs (i.e. standard rates or peak/off-peak tariffs). It concluded on the existence of a direct link between the anticompetitive conduct and the complainant's financial distress.</p>

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		<p>One of the key points highlighted by the Conseil is the fact that the tariff needs to allow for positive retail margins on average over the full portfolio of customers, and not over a portion of them. In fact, since customers have very different consumption patterns, it is likely that retailers will incur losses when selling to some of them and make positive profits when selling to others.</p> <p>Direct Energie being one of the very few alternative operators in the French retail market, its disappearance was considered a significant loss of competitive pressure in the market. The FCA also warned of possible medium-term spill-over effects on the residential electricity supply market, which was to be opened to competition shortly after these events, on July 1st 2007. This aspect of the market (i.e. the forthcoming complete opening of the market) implied that measures had to be taken immediately in order to avoid longer term effects on a larger customer base.</p> <p>The Conseil granted interim measures, but refused to impose those requested by the complainant. Direct Energie's requests were found to be either too specific to Direct Energie (and therefore susceptible to distort entry or expansion of third parties) or inappropriate to directly address the anticompetitive concerns. The FCA imposed two types of interim measures. First, following EDF's proposal, EDF was to design, within two months, a new long-term wholesale tariff to alternative operators based on nuclear production costs and allowing for effective downstream competition. However, this measure was only addressing medium-term concerns. The FCA therefore imposed on EDF the duty to negotiate a new one-year supply contract with Direct Energie in good faith, to be applied while the longer term tariff was being designed and discussed.</p>
<p><b>05-D-12, 17 March 2005, 20 Minutes/Méto vs EUROPQN</b></p>	<p><b>Essential facility and likelihood of anticompetitive effect</b></p> <p><b>Decision of the French Competition Council accepting the commitments presented by EUROPQN</b></p>	<p>The companies 20 Minutes and Méto, two editors of free daily newspapers financed entirely through advertising brought a complaint to the French Competition Council because the association EUROPQN (which brings together the large national daily newspaper editors) refused to include 20 Minutes and Méto newspapers in its biannual audience rating study.</p> <p>The complainants considered that this refusal prevented them from accessing the advertising market on fair competition terms, and thus claimed that such behaviour amounted to both an unlawful horizontal agreement and an abuse of dominant position. They also added to their complaint a request for interim</p>

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		<p>measures, which was rejected by the French Competition Council in a decision 04-D-40 of 3 August 2004.</p> <p>The French Competition Council first noted that EUROPN' study was seen as the reference tool by purchasers of advertising space, and widely used by all market players in the advertising sector. It noted that other existing studies were very expensive and did not guarantee the compatibility of their figures with the ones in EUROPN' study. Therefore, free newspaper editors were forced to build rough estimates of their audiences which weakened their position in commercial negotiations, and clearly put them at a competitive disadvantage compared to other editors whose newspapers were included in EUROPN' study. In addition, given the demand of advertising agencies for a unified benchmark, the French Competition Council indicated that the absence from EUROPN' study could not be offset by an inclusion in another separate study, which would only allow for a comparison of free newspapers among themselves but would not permit a comparison of free newspapers with paid-for newspapers.</p> <p>The French Competition Council concluded from this that the access to EUROPN' study constituted, if not a condition to enter the advertising space sale market, at least a significant competitive advantage. Therefore, EUROPN' refusal to include 20 Minutes and Métro newspapers in its study could amount to both an unlawful horizontal agreement and an abuse of dominant position.</p> <p>EUROPQN committed itself to including 20 Minutes and Métro in its study, to applying the same criteria and methodology as the one used for other national newspapers, and to publishing the results in a way that allows for full comparison between all newspapers. The French Competition Council accepted these commitments, a solution which led to the closure of the case prior to the imposition of a fine.</p> <p>Press release in French:</p> <p><a href="http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=149&amp;id_article=401">http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=149&amp;id_article=401</a></p>

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<p><b>04-D-54, 9 November 2004, Internet music downloads</b></p>	<p><b>Refusal to deal (to grant DRM access licence)</b></p> <p>Decision of the French competition Council : dismissal of the complaint on the merits and on interim measures</p>	<p>This case started when VirginMega lodged a complaint on the merits before the Competition Council against Apple Computer France, together with a request for interim measures.</p> <p>The question concerned the incompatibility between the digital rights management systems (DRMs) used by the VirginMega platform and the iPod walkmans manufactured by Apple.</p> <p>VirginMega was offering to consumers a platform to download music <i>via</i> the Internet. However, consumers could not transfer songs from this platform to Apple iPods, which were only compatible with the Apple DRM, called Fair Play.</p> <p>What was at stake in front of the Competition Council was Apple's refusal to grant a licence giving VirginMega an access to the Fair play DRMs, even under royalty payments.</p> <p>The Competition Council considered that access to the Fairplay DRMs was not essential for the development of on-line music download platforms. Moreover, this market was highly dynamic and two major operators were also entering it (Sony Connect and Fnac Music), so the risk that competitors might be eliminated was extremely low.</p> <p>Consequently, the Competition Council dismissed both the referral on the merits and the one for interim measures.</p>